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Risk control
Civil Liability Reforms –
where are we now?



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Civil Liability Reforms – where are we now?

Introduction

We have in recent years seen a raft of legal reforms aimed at controlling the spiralling costs of civil litigation, notwithstanding the small issue of Brexit the UK Government has also been busy in following through on its intention to introduce further reforms in the civil liability world to continue on its journey on controlling the cost of civil litigation. The impact of the reforms introduced to date have seen a mixed response, with fixed costs in certain areas leading to a rise in claims activity in others. Reduction in claims costs in lower value claims passing through the Portal countered by increased costs in high value claims through the discount rate reduction.

An increasing diversity of claims being aggressively pursued by claims management companies (CMCs) and claimant law firms alike has seen defendants in need of changing their own approach to handling claims.

Civil Liability Act

The claims landscape is due to change once more. The Civil Liability Act 2018¹ came into force in December 18 and its impact is likely to change the way personal injury claims are pursued and defended.

The Act itself has two parts; part one introduces a full reform programme to the way whiplash claims following a road traffic accident (RTA) are dealt with. Part two specifically focusses on the setting of the Discount Rate which following the amendment by the then Lord Chancellor in 2017 saw the rate change from 2.5% to -0.75%². This dramatic change in the way future losses are calculated caused large loss reserves to sky rocket.

Whiplash Reforms

As part of the whiplash reforms, the Government is looking to make changes via the Civil Procedure Rules (CPR)³ to increase the Small Claims Track (SCT) limit for RTA related personal injury claims to £5,000, with EL & PL injury claims set to rise to £2,000. The SCT limit increase and whiplash reform element of the Act will require additional protocols and amendments to the CPR. It is expected that the draft protocols will be published in September/October⁴.

The reforms look to introduce a fixed tariff for damages following a whiplash injury, the definition of such an injury as set out in the Act states;

“a sprain, strain, tear, rupture or lesser damage of a muscle, tendon or ligament in the neck, back or shoulder, or an injury of soft tissue associated with a muscle, tendon or ligament in the neck, back or shoulder.”

The tariff itself is yet to be published, the latest indication given prior to the Bill being passed gave a range of awards from £225 for an injury lasting up to 3 months to £3,725 for an injury lasting up to 24 months. The tariff is still subject to change and we may well see an increase to the levels originally proposed be it in line with inflation or higher. Of note is that the new edition of the Judicial College Guidelines for the assessment of general damages in personal injury claims is due to be updated in September this year also.

To support the changes with the whiplash reforms, a new IT Platform is being designed to enable unrepresented claimants the ability to progress their own claim irrespective of whether they have legal representation. Decisions are still to be made on a number of issues relating to how unrepresented claimants will obtain a medical report. The Government is currently undertaking a consultation to seek views on a revised medical reporting process for unrepresented claimants⁵.

The consultation looks to consider;

- Expanding MedCo's remit to cover initial medical reports for all RTA related personal injury claims under £5,000
- Whether to widen the type of medical expert who can be registered on the MedCo system
- Whether to extend the existing fixed cost medical report regime for medical reports

The introduction of the whiplash reforms has been set for April 2020, needless to say there is still much work to be done in all areas the reforms cover, and we will no doubt see much development in the next few months.

¹ <http://www.legislation.gov.uk/ukpga/2018/29/contents/enacted>

² <https://www.abi.org.uk/products-and-issues/topics-and-issues/personal-injury-claims/discount-rate/>

³ <https://www.justice.gov.uk/courts/procedure-rules/civil>

⁴ <https://www.gov.uk/government/consultations/reforming-the-soft-tissue-injury-whiplash-claims-process>

⁵ <https://consult.justice.gov.uk/civil-law/future-provision-of-medical-reports/>

Discount Rate Review (England and Wales)

Part 2 of the Civil Liability Act looks at the way in which the Discount Rate for calculating future losses is set, in short.

- The Lord Chancellor is to set the rate
- The first review must be started within 90 days of enactment of the Bill
- The Lord Chancellor must decide the rate 140 days after the review period commenced and the Government Actuary and Treasury will be consulted.
- Each subsequent review must be started within five years of the last review and will have a 180 day review period. The Lord Chancellor will consult an expert panel and the Treasury.

The announcement that the formal process to review the rate was made on 19 March 2019 with a decision on the rate to follow on or before 5 August 2019. It is widely expected that the rate will increase from its present position to somewhere between 0% and 1%, and the Government have indicated based on current evidence a +0.5% rate is likely⁶.

Discount Rate Review (Scotland)

In Scotland the Damages (Investment Returns and Periodical Payments) (Scotland) Bill has been approved by the Scottish Parliament.

The Bill includes a late amendment by the Scottish Government to increase the standard adjustment for investment charges and taxation to 0.75%. The initial calculation under the model proposed would lead to a discount rate of -0.25%.

Following the Bill receiving Royal Assent the Government Actuary's Department will finalise the Discount Rate for Scotland. It is anticipated that these steps will take some months and it may be autumn before the process delivers a new Scottish discount rate.

It seems the Scottish discount rate will be decided some months after the rate is set in England and Wales. The Scottish rate is likely to be significantly lower which in turn will see significantly higher awards made in Scotland than in England & Wales.

⁶ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-03-19/HCWS1427/>

Jackson Part II

We also have a consultation in progress which looks at the further proposals set out by Lord Justice Jackson in his report in 2010, in short the consultation looks at the implications of implementing the proposals which would expand the fixed costs regime to include claims with a value to £100,000 and a re-structuring of the fast claims track to enable different claims to be placed into appropriate costs categories.

The Government's statement within the consultation paper leaves little doubt to its intentions in this area⁷;

'Subject to consideration of the responses we receive, our intention is to implement these reforms as set out in this consultation paper. We will keep them under review once implemented. It remains our intention to extend the areas in which costs are controlled in due course: such an extension could include extending FRC to further categories of claims, including claims of higher value, and controlling costs incurred before the first costs and case management conference (CCMC), where cases are not otherwise subject to FRC.

Summary

Needless to say the claims landscape is set for much more change in the coming months, how claimants and claimant representatives react is yet to be seen. Behaviours around the compensation process will need to be closely monitored to ensure that the necessary control over claim spend is in place, process and procedure around handling a greater number of direct claimants in whiplash claims needs to be considered, the battlegrounds around the interpretation in any amendments to the CPR will no doubt develop potentially seeing a rise in litigation.

Will the split in the SCT limit in RTA claims to EL & PL see more activity in the non-motor casualty arena? The combination of a lower SCT limit and a natural inflation in damages may well be seen as an attractive proposition to CMCs and claimant law firms previously operating in the RTA world.

We will continue to monitor the progress of all reforms impacting on our clients and as always, we will continue to keep you updated with developments as they occur.

⁷ [http://data.parliament.uk/DepositedPapers/Files/DEP2019-0417/Fixed Recoverable Costs Consultation Paper.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2019-0417/Fixed_Recoverable_Costs_Consultation_Paper.pdf)

Further information

For access to further RMP Resources you may find helpful in reducing your organisation's cost of risk, please access the RMP Resources or RMP Articles pages on our website. To join the debate follow us on our LinkedIn page.

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For more information, please contact your broker, RMP risk control consultant or account director.

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